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FAIR HOUSING THROUGH MUNICIPAL LICENSING

INTRODUCTION

The city of Kirkwood, Missouri, situated about fourteen miles southwest of the City of St. Louis, is predominantly a residential area with a population of 29,461, according to the 1960 census. Present estimated population in 1966 is 32,000. At the time of the 1960 census, approximately 85% of the families living in Kirkwood owned their own homes. Kirkwood's municipal government is of the commission form as set out for third-class cities. In November 1959 a proposed charter to make Kirkwood a home-rule city was defeated in a special election.

The Kirkwood Fair Housing Council, a group of private citizens who, for the most part, own their own homes, has expressed interest in exploring the possibility of passing an ordinance providing for the licensing of real estate agents handling property located within the city. Realizing that there is a lack of open housing in suburban areas, and believing that there is a felt need for provisions governing both the quality and the trade behavior of realtors, the Council seeks to supplement the state licensing requirements by providing that realtors selling property in Kirkwood shall be under an affirmative duty to inform the buyer of the zoning laws and the housing code, and to refrain from participation in panic peddling or discrimination in showing property on the basis of race, religion, or national origin.

After the Kirkwood Fair Housing Council had discussed its objectives, the Webster Groves Fair Housing Committee expressed a desire to pass a similar ordinance in its community. Webster Groves, a neighboring community to Kirkwood, has long been an established residential area consisting mainly of single family

dwellings. Unlike Kirkwood, however, Webster Groves is a home-rule city and thus has additional powers under its charter that shall be discussed in Section I(C).

The difficulties in passing a real estate licensing ordinance are twofold. First is the problem of the city's power to enact a licensing ordinance; second is the problem of possible state preemption of the field of licensing real estate agents.

SECTION I

POWER TO ENACT A LICENSING ORDINANCE

All municipalities are the creation of state legislatures, so any municipality only has the powers specifically granted it by the State. What provisions of the Missouri Revised Statutes allow a city of the third class to enter the area of licensing real estate agents? There are two possibilities. One, the Legislature has specifically granted the municipality the power to tax and/or regulate and/or prohibit certain activities and professions. Two, the Legislature has conveyed to the municipality a broad power to enact ordinances to advance the general welfare.

A. Licensing Power Under A Specific Legislative Grant

Turning now to the Missouri legislature's specific grant to cities of the third class to regulate certain kinds of commercial dealings, MO. REV. STAT. § 94.110 reads:

> The council shall have power and authority to levy and collect a license tax on . . . real estate agents . . . ; and to levy and collect a license tax and regulate hawkers, peddlers, . . . and all others pursuing like occupations; and to levy and collect a license tax, regulate, restrain, prohibit and suppress ordinaries, money brokers. . . .

The three layers of the statute provide for differing degrees of possible local interference. Those occupations falling in the first division can only be taxed, those in the second can be taxed and regulated, and those in the last division can be taxed, regulated and prohibited. From this format one necessarily derives the notion that occupations in the second division cannot be prohibited and that occupations in the first division cannot be prohibited and/or regulated.

It is obvious, to begin, that Kirkwood has the power to levy and collect a tax on real estate agents since that group is specifically named in the first division of the statute cited above. Still, it might be contended that real estate agents also fall into the second division and can thus be regulated as well as taxed, for realtors could be included in the "like occupations" category which concludes the enumeration in the second division. Such a catch-all phrase is useful for the legislator who, fearful that he has not named all the specific professions he wants controlled locally (and name them all he never could), still desires to provide outlines of the types of occupations to be regulated, leaving the details of implementation to other governmental bodies to be answered as specific situations arise. So the issue is the degree of likeness between realtors and the professions specifically named in the second division.

There is a maxim of contruction whose application to the language of this statute might prove beneficial in predicting what a court's interpretation would be. In City of Caruthersville v. Faris, 237 Mo. App. 605, 146 S.W.2d 80 (1940), the court announced that "The rule is that where in a statute general words follow the enumeration of particular classes, the general words will be construed as applicable only to things of the same general nature as those enumerated." 146 S.W. 2d at 86. This rule of statutory construction is known as ejusdem generis and the purpose of using such a rule is to arrive at the probable intention of the legislature. Consequently, the rule of ejusdem generis would never be followed by a court should it yield an improbable result. However, if

the court has correctly ascertained the important element linking the specifically enumerated classes, inconsistent results following from the application of ejusdem generis would be few indeed.

How the Missouri courts apply ejusdem generis principles in a licensing context is demonstrated in City of St. Louis v. Herthel, 88 Mo. 128 (1885). The precise question before the court was whether a home-rule city can require a city license of an architect when the city's charter does not specifically list architects among the professions to be licensed. The language of the charter conferred power "to license, tax, and regulate, lawyers, doctors, doctresses, undertakers . . . and all other business, trades, avocations or professions whatever." Stating that "the words 'all other business, trades, avocations or professions whatever' must not be wholly rejected," the court concluded that "architects are, for the purpose of construction here, to be held as ejusdem generis with lawyers, doctors, dentists and artists, as exercising a profession of technical character." . . . 88 Mo. at 129, 130.

The technique is to isolate the common aspect or the unifying characteristics of the enumerated classes and then to test whether this aspect or these characteristics are discoverable in the unenumerated class sought to be subsumed under the final general phrase. Applying this technique to the specific problem of regulating real estate agents, what common characteristics are discoverable?

Undoubtedly, realtors are often like peddlers and hawkers. In fact, one facet of the proposed ordinance is aimed to stop the practice of panic peddling by realtors. Panic peddlers are those real estate agents who, after a Negro family has moved into an all-white block, call or visit the white families, tell them the neighborhood is declining, convince them that land values are going to fall, and try to persuade them to sell and move out. By painting a picture of falling values for property in the neighborhood, the realtor can often persuade the white home owner to sell quickly, and at a very low price, to the realtor.

In this aspect the realtor is very close to the generic class of occupations that peddlers represent. The legislative intent calls for local regulation of those sharp practices that could prove detrimental to unwary citizens.

Is a realtor a mercantile agent? "The word 'mercantile', in its ordinary acceptation, means 'pertaining to the business of merchants', and is concerned with trade or the buying and selling of commodities." People v. Federal Sec. Co., 225 Ill. 561, 99 N.E. 668, 669 (1912). "An agent is defined to be one who acts for or in the place of another by authority from him, one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter." . . . Baker v. Fenley, 233 Mo. App. 998, 128 S.W. 2d 295, 297 (1939). Surely the realtor is an agent, acting for his principal -- the land owner -- and it is also evident that the realtor is concerned with the buying and selling of the commodity real property.

Evidently, from the sampling of occupations discussed above, the legislature has granted to the municipality a regulatory power over those businesses which have a certain element in common. But just what is that element? Some occupational activities, more than others, can adversely affect the public when done by unscrupulous or unqualified individuals. The statute granting authority to license encompasses a range of such occupations, and it does not seem unreasonable to include real estate agents among them.

That real estate agents play a vital role in the transfer of real property is indisputable; likewise, that an unprincipled realtor can do immense damage to the community through unscrupulous practices is clear. The Missouri legislature has recognized this by providing certain fundamental statewide requirements that real estate agents must follow in order to be licensed by the state. Hence, the legislature, recognizing the possible dangers resulting from sharp practices by realtors and seeing the need for local as well as state regulation, could have meant to allow municipal regulation under the statutory construction doctrine

of ejusdem generis as it applies to the phrase "and all others pursuing like occupations" which follows a catalogue including hawkers, peddlers and mercantile agents.

It should be mentioned at this point that a court, believing that the rule of ejusdem generis would be inapplicable since the class "real estate agents" is mentioned specifically in another division of the same statute, might not employ it. Indeed, should the court rest its analysis on a maxim, they might employ the rule of "inclusio unius est exclusio alterius." One court held:

> . . . [W]here a statute enumerates and specifies the subjects or things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned, or, under a general clause, those not of like kind or classification as those enumerated. State ex rel. Whall v. Saenger Theatres Corp., 190 Miss. 391, 200 So. 442, 446 (1941).

An extension of this rule would logically indicate that the specific inclusion of real estate agents in the first division calls for the exclusion of this same category from the second and third divisions. As stated above, the three divisions of this statute reflect three distinct levels of legislative grant of power to municipal authorities. Consequently, or so the argument goes, one would not expect from a sensible legislature that the same class would fall into more than one of the three levels. For if the legislators had intended the local authorities to have more than just the power to levy and collect a tax on real estate agents, surely they would have named real estate agents in a different division. Having put real estate agents in the division that can only be taxed (and not regulated and/or prohibited), it is sensible to assume that the legislature meant what they said.

In part, the foregoing discussion displays the weaknesses inherent in maxims of any sort. The two legal maxims "ejusdem generis" and "inclusio unius est exclusio alterius" often call for diametrically opposed results. However,

more importantly, the foregoing discussion is meant to suggest that the courts have great leeway in choosing to apply whatever maxim they feel a specific situation demands. Still, the important task is to demonstrate to the court the vital need that the result be one way rather than the other, to convice the judges of the correctness of the proposed result, and to show them the legal avenue by which such a result may be reached. Courts, as well as legislatures, can form policy and regulate behavior, and this power must not be overlooked.

B. Licensing Power Under A General Welfare Grant

For these very reasons it is important that any proposed ordinance also rest on the municipality's power to provide for the general welfare. MO. REV. STAT. §§ 77.590 provides, for cities of the third class, that

> the council . . . shall also have power to enact and make all such ordinances and rules, not inconsistent with the laws of the state, as may be expedient for maintaining the peace and good government and welfare of the city and its trade and commerce. . . .

A subsequent section in the same statute provides that penalties in such ordinances cannot exceed a fine of one hundred dollars and a three-month sentence. However, within that limitation and the limitation of harmony with the general law of Missouri, the municipality has broad discretion in selecting the means for providing for the welfare of the city and its trade and commerce. Once again the thought is that local problems are best handled by local authorities, a variety of problems requiring a variety of different solutions.

Unfortunately, there are no pertinent Missouri cases interpreting the scope of general welfare clauses such as the one found in MO. REV. STAT. § 77.590. In other jurisdictions, however, there has been some discussion. In Huff v. City of Des Moines, 244 Iowa 89, 56 N.W.2d 54 (1952), the plaintiff, owner of a trailer park site, sought a writ of mandamus to compel the issuance of a permit for the

operation of his trailer park which was located in an area partially zoned commercial and partially zoned residential. The court's disposition of the case as it affects the commercial zone is immaterial to the present discussion. However, the handling of the case as it affects the residential zone is important. For the plaintiff to obtain a permit under the municipal ordinance for a trailer park in that area, he would have had to get the signatures of 60% of the occupants in residential buildings located within a 200-foot area of the trailer camp site. Plaintiff claimed that the city did not have the power to impose such a requirement. The city said it had the power under Section 366.1 of the Iowa code, which grants the city power to enact such ordinances ". . . as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof. . . ." The court upheld the city's position, saying that the challenged requirement was within the city's power to regulate, under the general welfare clause quoted above. While the court did not have to deal specifically with the question whether a general welfare clause empowers a municipality to license an occupation or activity, it did sustain the city's right to impose certain restrictions on the business of trailer parks before an operating permit would be granted. In evaluating this case, however, it is necessary to remember that the permit here sought was, in effect, the equivalent of a license to do business.

The cases dealing specifically with the power to license under a general welfare clause are few. The Wyoming Supreme Court in Western Auto Transports, Inc. v. City of Cheyenne, 57 Wyo. 351, 120 P.2d 590, 596 (1942), stated that "if the city has the power to levy a tax, it must be under its power to license. That power does not exist under the general welfare clause. 2 Dillon, MUNICIPAL CORPORATIONS § 637 (5th ed.)." While this statement might seem to suggest that the municipality does not have the power to license under a general welfare

clause, this is not what Dillon states in § 637 and this is not the way the same court interpreted itself in Blumenthal v. City of Cheyenne, 64 Wyo. 75, 186 P.2d 556 (1947). There the court announced:

> In the case of State v. Morrow, 175 Minn. 386, 221 N.W. 423, it was held that the general welfare clause as found in the charter is intended to give ample power to a municipality to enable it to meet and provide for new conditions as they arise. The clause, however, has its limitations. Thus we held in Western Auto Transports, Inc. v. City of Cheyenne; infra that the general welfare clause did not grant the city the power of taxation, citing 2 Dillon on MUNICIPAL CORPORATIONS, 637.

The decision in State v. Morrow, 175 Minn. 386, 221 N.W. 423 (1928) makes it evident that the city can require licenses for some occupations under the general welfare grant. Morrow, the defendant, was convicted under an ordinance banning the operation in Minneapolis of any "open-air motor vehicle parking place" that accommodates ten or more cars unless the operator has obtained a license. The general welfare clause of the city charter allowed the city to ". . . have full power and authority to make . . . such ordinances for the government and good order of the city . . . as it shall deem expedient." Such a clause, stated the court, ". . . is intended to make the powers of the council sufficiently expansive to enable them to meet and provide for new conditions as they arise." 221 N.W. at 423.

Another Minnesota case suggests an even wider scope for municipal action under the general welfare clause. In State ex rel. Remick v. Clousing, 205 Minn. 296, 285 N.W. 711 (1939), the city ordinance required plasterers to get a city license before they could be eligible for the permit necessary for those who work in Minneapolis. There was a twenty-five dollar fee for the license. Asking the question, can plasterers be licensed even though not named in the city charter, the court answered in the affirmative stating,

> This court has held on numerous occasions that the general welfare clause is not limited to the

> things enumerated and that it authorizes the regulation and licensing of businesses not specifically referred to in the charter. . . . The welfare clause contained in the charter is intended to make the powers of the council sufficiently expansive to enable them to meet and provide for new conditions as they arise. . . . It is not to be strictly construed. 285 N.W. at 713.

Therefore, it is evident that the holding in the Western Auto Transports case must be confined to the narrow meaning that the city, under the general welfare clause, does not have the power to levy a tax aimed at producing revenue. While the Minnesota cases arose under a welfare clause in a home rule charter, the rules of construction are the same as those applied to statutes.

Apparently the trend in these cases is to allow broad discretion to the municipality to enact necessary legislation under its general welfare provision. As pointed out in McKelley v. City of Murfreesboro, 162 Tenn. 304, 36 S.W.2d 99 (1931).

> While applying strictly to all ordinances the limitation to reasonableness, the extent of the powers delegated by general provisions may be construed liberally. Specific enumeration is not essential when the intention of the legislation to confer broad power is manifest. Unquestionably the modern tendency is toward the enlargement of the scope of the delegation to local subdivisions, or arms, of the state of powers of local government. 36 S.W.2d at 101.

Given this liberality and the need of the community to pass regulations governing the rental and sale of housing, it seems probable that Kirkwood could license real estate agents even in the absence of an express legislative grant.

C. Licensing Power Under The Webster Groves' Home Rule Charter

Turning now to the City of Webster Groves, one finds a far simpler expression of intent. As the name would suggest, home-rule cities have extensive powers of local government. Webster Groves, taking advantage of this, provides, in Art. 1, Sec. 1.3 of its charter,

> . . . the city shall have all powers of local self-government and home rule, and all powers possible for a city to have under the Constitution and laws of Missouri, or which it would be competent for the Legislature to grant; and except as prohibited by the Constitution or laws of Missouri, the City may exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever.

Furthermore, the City has the power, under Art. 2, Sec. 2.13 (21) to "license, tax, and regulate all businesses, occupations, professions, vocations, activities or things whatsoever set forth and enumerated by the laws of Missouri now or hereafter applicable to constitutional charter cities or cities of the First, Second, Third or Fourth Class. . . ."

Consequently, the City of Webster Groves assumes all powers possible to assume, and if any municipality can license real estate agents, Webster Groves can. As a result, the only question is whether any city in Missouri can require a license of real estate agents. This discussion, involving state preemption problems, follows in Section II. As it will indicate, the power to license real estate agents locally is expressly conferred on first and second class cities, and this power has been assumed by the Webster Groves charter.

SECTION II

THE QUESTION OF STATE PREEMPTION

Assuming for the present that cities of the third class have the right to regulate real estate agents, can the municipality include provisions in their licensing ordinance that are not included in the state statute? In legal terminology, the question is whether there has been state preemption of the licensing of real estate agents. In approaching this subject, it is helpful to determine in what ways the Legislature can be said to have preempted the field. On one hand, there might be express preemption, in which case the Legislature has announced its intention that its scheme be the sole regulation in the statute.

This the Missouri Legislature has not done. Consequently, if there is preemption it must be implied preemption, or preemption in the face of legislative silence. Obviously when the question of preemption by silence arises, the court must decide whether the Legislature intended preemption by occupation of the field of regulation in which the statute applies. After looking at the statute and determining the scope and completeness of the state provisions the court must decide either that the Legislature did intend to occupy the field or that they did not enact a complete regulatory system and hence did not intend to occupy the field. The major problem, then, is to determine whether the state provisions are so comprehensive in their coverage as to preclude supplementary municipal control or whether the state provisions supply but the outlines of the scheme, thus allowing for additional local regulation.

On what basis can the municipality claim that there has been no preemption of their power to license? In licensing cases the possible bases of power are either the taxing power or the police power. It is evident that Kirkwood's proposed ordinance would rest on the police power since the intention is to regulate the activities of a class. The purpose of a tax is to raise revenue. Since any tax on the issuance of a license for realtors would be a nominal sum assessed to defray administrative costs, the licensing could not be considered a revenue producing measure. This is fortunate for, as one observer has noted, "A general survey of the many home rule decisions would reveal that the Missouri Supreme Court has been more favorably inclined toward local autonomy in matters pertaining to the police power of the city than in any other functional area." Schmandt, Municipal Home Rule in Missouri, 1953 WASH. U.L.Q. 385, 403. The taxing power will be strictly construed against the city while the police power will receive a more liberal interpretation. Bredeck v. Board of Education, 213 S.W.2d 899 (Mo. 1948).

A. Judicial Attitude Toward State Preemption in Other Jurisdictions

Even when acting under the police power, supplemental municipal ordinances are confronted with careful judicial scrutiny in some jurisdictions. California, for example, after numerous vacillations in attitude, seems to have concluded that municipal regulations are invalid if they require a license applicant to submit to a local examination as well as a state examination. Note, 47 CALIF. L. REV. 607 (1959). One leading case in the preemption area is Horwith v. City of Fresno, 74 Cal. App. 2d 443, 168 P.2d 767 (1946). In that case the court invalidated a municipal ordinance which sought to impose additional qualifications on electrical contractors licensed and qualified by the state. The court observed in the course of its opinion:

> The state license implies permission to the licensee to conduct his business at any place within the state. This permission should not be circumscribed by local authorities. 168 P.2d at 770.

An article on preemption in California concludes that, after the Horwith case, "Later decisions have consistently recognized that State regulatory licensing implies a legislative intent to preclude additional regulations." . . . Blease, Civil Liberties and Preemption, 17 HAST. L.J. 517, 537 (1966).

Moreover, there is often close judicial interest in the fitness of the local regulation to meet local needs. Take, for instance, the decision in State v. Stockl, 85 N.J. Super. 591, 205 Atl. 2d 478 (1964). There the municipality's ordinance requiring a license for real estate agents who solicit from door-to-door was invalidated on two grounds. The court first held that the comprehensiveness of the state provisions governing the licensing of real estate agents precluded any supplementary regulations by local authorities. (The New Jersey statutes regulating realtors which comprise Title 45 of the N.J. Revised Statutes, are far more complete in scope and detail than the corresponding Missouri statutes.) An alternate ground of decision was the failure, on the municipality's

part, to show that the ordinance filled a local need.

> There are no additional regulations to aid and further the purpose of the general state law appropriate to the necessities of the Hadden Heights locality nor any local concern which may be determined to be peculiarly necessary and proper for the good and welfare of local inhabitants. 205 Atl. 2d at 482.

Likewise, the courts in some jurisdictions are quick to find state preemption when a criminal penalty attaches to the ordinance governing the same area as the state statute. The California courts are particularly fearful of ordinances that might infringe on a person's civil liberties. For instance, in In re Lane, 58 Cal. 2d 99, 22 Cal. Rptr. 857, 372 P.2d 897 (1962), the court had before it the validity of an ordinance that provided criminal sanctions for enumerated sexual activities. There the court held:

> The Penal Code Sections covering the criminal aspects of sexual activity [are] so extensive in their scope that they clearly show an intention by the Legislature to adopt a general scheme for the regulation of this subject. 372 P.2d at 899.

A reading of the whole opinion makes it evident that the court favored the policy of statewide uniformity in laws regulating criminal conduct in order to obviate the fear of trapping a transient population with multiple and inconsistent local ordinances. Similarly, the courts strike down local ordinances with criminal penalties that duplicate state provisions, since duplication might result in double prosecution.

While the cases above are not exhaustive of the field of preemption, they do suggest close judicial inquiry when the municipality enters an area touched on by a state statute. In part, this scrutiny is traceable to the recurring presence of criminal sanctions in the municipal regulations. Still, even absent any fears of double jeopardy or possible infringement of civil liberties, many courts favor, on policy grounds, the benefits of statewide uniformity over the freedom of local governmental units to enact supplementary regulations.

B. The Judicial Attitude Toward State Preemption in Missouri

As opposed to the situation in other jurisdictions, the Missouri cases on preemption, though few in number, evidence a liberal attitude toward local regulations. One possible explanation for this divergence might be that none of the Missouri cases involve the immediate threat of criminal sanctions.

In Vest v. Kansas City, 355 Mo. 1, 194 S.W.2d 38 (1946), the plaintiff sued to enjoin the enforcement of a city ordinance calling both for inspection of barber shops and physical examinations of barbers every six months. Since the plaintiff was suing for an injunction, the court was not presented with a conviction under the ordinance. Not being confronted directly with criminal sanctions, the court did not discuss that problem in its brief opinion. Furthermore, the plaintiff only argued that the state statute fully regulated the barbering profession, calling as it did for physical examinations every twelve months. The court refused to enjoin the enforcement of the local provision since it concluded, from a perusal of the pertinent legislation, that "The statute regulating barbering does not attempt to assert sole control over the subject matter." 194 S.W.2d at 39.

As seen in the Vest case the court upheld an ordinance more stringent than the statute; and in City of St. Louis v. Scheer, 235 Mo. 721, 139 S.W. 434 (1910), the court upheld an ordinance less stringent than the statute. In the Scheer case, the City of St. Louis had set a lower standard of fat content for milk than had the state. The defendant was found guilty of noncompliance with the city standard and was fined twenty-five dollars. The court, in a rather foggy manner, suggested the following test to determine whether the ordinance could stand.

> . . . [S]o long as an ordinance, within the grant of municipal legislative power, falls within (that is, does not exceed, or is not inconsistent with) the state statute, there is no conflict or inconsistency in the sense making the ordinance void. 139 S.W. at 436.

Since the local regulation set standards lower than those required by the State, there could be no conflict under the court's definition. Also, "It was held, in effect, [in City of St. Louis v. Klausmeier, 213 Mo. 119, S.W. 516 (1908)] that a lower municipal standard for milk was not in the nature of an authorization to sell in violation of the state law. It was merely prohibitory in character." 139 S.W. at 436.

One final pertinent case, Brotherhood of Stationary Engineers v. City of St. Louis, 212 S.W.2d 454 . .(1948), upheld the validity of a city licensing ordinance against plaintiff's claim that the state had preempted the area of licensing stationary engineers. The state law provided that the Brotherhood of Stationary Engineers, the plaintiff in the action, could grant certificates of qualification to those members of the Brotherhood who passed the union's examination; furthermore, the state law provided that "any such certificate (is) to be prima facie evidence of the qualification of the person to whom it is issued." The court quickly dismissed the plaintiff's complaint since the state law clearly did not purport to occupy the licensing field and since the Brotherhood had not shown that the city was not recognizing the Brotherhood's certificates of qualification as "prima facie" evidence of the applicant's merit. In the course of its discussion, however, the court did remark:

> . . . even though there is a state law on a given subject, a city is not thereby prohibited from enacting a supplemental ordinance in relation to the same subject, as long as there is no conflict between the ordinance and the state law. 212 S.W.2d at 458-459.

From these three cases it is possible to extract some hints concerning the attitude of the Missouri courts toward preemption. First, and most obviously, in all of the cases the court upheld the validity of the ordinance being challenged, which powerfully suggests a hesitancy to hold that the state has occupied the entire field. The reason for this distaste might be an awareness that such an announcement precludes further action in the given area absent new

statutory regulations, even though the need for such control be pressing in certain localities. The Scheer case and the Brotherhood of Stationary Engineers case both provide formulas for determining whether the local ordinance is in conflict with the general law of the state. The very fact that the court reached that stage meant that they must have already decided that the state law had not completely occupied the field. The court in Vest articulated this position by flatly declaring that the state statute ". . . does not attempt to assert sole control over the subject matter." Supra at 39. Unfortunately, no reasons for arriving at this conclusion are given, but it is clear that the court must look to the scope and nature of the statute to determine whether the legislature, even though silent on the question, meant to occupy the field.

C. Scope of State Statutory Provisions Governing Real Estate Agents

In answering the question of possible occupation of the field it is next necessary to examine two sections of Chapter 339 of the Missouri Revised Statutes. Section 339.040 reads:

> A license shall be granted only to persons who bear and to corporations or associations whose officers bear, a good reputation for honesty, integrity, fair dealing, and who are competent to transact the business of a real estate broker or a real estate salesman in such a manner as to safeguard the interests of persons whom they represent.

The pertinent divisions of § 339.100 state:

> The commission may . . . investigate the business transactions of any real estate broker or real estate salesman and shall have the power to suspend or revoke any license obtained by false or fraudulent representation or if the licensee is performing or attempting to perform any of the following acts or is deemed to be guilty of:
>
> 1. Making substantial misrepresentations or false promises in the conduct of his business, or through agents or salesmen or advertising, which are intended to influence, persuade or induce others;

> 2. Acting for more than one party in a transaction without the knowledge of all parties for whom he acts; . . .
> 4. Representing or attempting to represent a real estate broker other than the broker with whom associated without the express knowledge and consent of said broker; . . .
> 7. Any other conduct which constitutes untrustworthy or improper, fraudulent or dishonest dealing, or demonstrates bad faith or gross incompetence; . . .
> 10. Placing a sign on any property offering it for sale or rent without the consent of the owner or his duly authorized agent. . . .

Although MO. REV. STAT. § 339.040 is phrased in affirmative terms, it is obvious that its purpose is to prohibit the granting of a license to those who do not possess the named qualifications. Furthermore, this section sets forth the bare outlines of the ethical standards real estate agents are to follow, and MO. REV. STAT. § 339.100 provides but few examples of the practical implementation of the policy of § 339.040. Meager though these provisions are, they do offer some notion of the general type of activity to be banned.

However, it should be noted that the sections cited above refer only to the realtor's fiduciary duties toward the individuals involved in the sale -- the buyer and seller, or their agents; there are no regulations covering the realtor's general obligations to the community. In relation to the realtor's fiduciary duties toward individuals involved in the transaction, the Kirkwood ordinance would prohibit certain activities deemed to be conduct constituting improper dealing. Fair dealing and honesty would call for the realtor to inform the buyer of the zoning laws and the building code provisions, and integrity, honesty, and fair dealing would call for him to show the property to every interested party, for only in this way could the agent "safeguard the interest of persons" he represents, that interest being to find a buyer. However, as Kirkwood is an urban residential area, its criteria for fairness and honesty would differ from those of a rural community. A realtor in Kirkwood selling a home would not be considered dishonest for failing to state that an excess of acid

in the ground made it impossible to grow some crops, while the withholding of this same information when selling a farm might well be dishonest. Thus it is that the statute can be interpreted to permit local ordinances which impose differing regulations depending on the nature of the area.

While there might be some question whether the state intended to preempt all of the area of regulation over the realtor's fiduciary responsibility, there can be no such question concerning the state's intention to regulate the realtor's obligation to the community since that area is not even touched by the state statute. All the prohibitions in § 339.100 concern the realtor's duties toward interested parties. The real estate agent's obligation to the community has not been delineated, and for a good reason. Who could better provide standards for the real estate agent in this area than the very community in which the realtor is operating? Leaving the formulation to the local unit assures maximum coverage of the prevailing community needs. So quite properly this area is not included under the state statute. This being so, the state cannot be said to have occupied this field, and the city is capable of enacting regulatory provisions aimed at delineating the scope of the real estate agent's duty to the community.

D. Other Statutes Bearing on the Preemption Question

The Missouri legislature has, in other statutes, enacted language that clearly demonstrates an intention for local licensing of real estate agents to exist along with the state licensing scheme. MO. REV. STAT. § 73.110(17) permits cities of the first class "To license, tax, and regulate . . . real estate agents. . . ." MO. REV. STAT. § 75.110(18) delegates, in the exact same words, identical power to cities of the second class. Obviously such language goes against any attempt to show a legislative intent to occupy the licensing field.

It is true that the delegation of authority to cities of the third class, like Kirkwood, is not as clear on the licensing power, but for reasons stated in Section I, this power might exist. However, there can be no doubt but that Webster Groves can license real estate agents. Under Art. 2, Sec. 2.13(21) of its charter cited above, Webster Groves reserves all licensing powers possessed by cities of any class. And since cities of the first and second class have specific power to license real estate agents, Webster Groves also possesses such power.

CONCLUSION

The Kirkwood ordinance is reasonably aimed to assure that new property owners will be well informed regarding their duties; further, the ordinance attempts to solve, on a local level, a problem experienced nationally. And the city's interest in preventing the formation of a Negro ghetto similar to nearby Meacham Park is undeniable. So there is a need -- and the licensing ordinance is reasonably adapted to fill that need.

While no Missouri case serves as direct precedent, a municipality can enact regulatory schemes on subjects already regulated by state law provided there is a legislative grant of power to the municipal authorities, and provided there is no preemption. At best, the Missouri statute governing real estate agents provides the bare outlines of the ethical system which realtors are to follow in their dealings with the buyer and seller. Nothing is mentioned of the realtor's duty to the community, so on this point there could not be preemption. Further, the presence of specific legislative grants to cities to "license . . . real estate agents" strongly argues against preemption. Absent any conflict between the general and local law, a local real estate licensing ordinance can be seen as a valid exercise of local powers.